

Comments

SURVIVING THE "CHUBASCO"[†]: LIABILITY OF CALIFORNIA BEACH COMMUNITIES FOR NATURAL CONDITIONS OF UNIMPROVED PUBLIC PROPERTY

In the 1961 case, Muskopf v. Corning Hospital District,¹ the California Supreme Court judicially abolished sovereign immunity. In response to Muskopf, the state legislature passed the Tort Claims Act of 1963. Section 831.2 of the Tort Claims Act specifically provides governmental immunity for injuries caused by natural conditions of unimproved public property. For two decades California courts were faithful to the clear legislative intent behind this immunity. Recently, however, California courts have circumvented this immunity in cases in which injuries have occurred along California's coast. This Comment argues for legislative intervention to re-establish the protection that section 831.2 was meant to provide California coastal communities.

INTRODUCTION

Each year millions of beachgoers visit California's public beaches.² These beaches are an attractive source of public recreation primarily

[†] The term "chubasco," which means "windy storm" in Spanish, is used by California surfers to describe tropical storms that develop off the coast of Baja California, Mexico from late spring to late summer. These storms typically send large surf to the south-facing beaches of southern California. See generally George, *A Vintage Year*, SURFING MAGAZINE, July 1986, at 68, 71-77 (this article provides a good explanation of what causes surf in California and contains numerous references to "chubasco" as used by California surfers).

1. 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961).

2. In 1984 California lifeguard agencies reported a total beach attendance of

because of their natural and unimproved state.³ Although these beaches provide a tremendous recreational resource, they present an inevitable risk of injury to the beachgoing public. Dangers presented by the beach environment include: wave action, rip currents, submerged rocks, shifting sandbars, and dangerous marine life.⁴ Not only do these natural conditions endanger the beachgoing public, they represent a source of expanding liability for California coastal communities.

In 1963 the California Legislature enacted the Tort Claims Act (Act).⁵ Under the Act all judicially-created public entity liability is eliminated;⁶ public entity liability can be established only as provided by statute.⁷ Additionally, public entity liability may be expressly barred by statutory immunities.⁸

Under the Act, public liability for dangerous or defective conditions of public property is governed by Government Code sections 830-840.6. Section 835 prescribes the basis and requisites for public entity liability for injuries caused by dangerous conditions of its property.⁹ Section 831.2 provides an exception to section 835 liabil-

160,700,000. Statistics on file with Huntington Beach Lifeguard Captain Bill Richardson. Captain Richardson is the statistician for the Western United States Lifesaving Association.

3. See *Rendak v. State*, 18 Cal. App. 3d 286, 95 Cal. Rptr. 665 (1971).

4. UNITED STATES LIFESAVING ASSOCIATION, LIFESAVING AND MARINE SAFETY 9-12 (1981) [hereinafter cited as LIFESAVING AND MARINE SAFETY].

5. Cal Stats. 1963, ch. 1681, § 1, at 3266, adding CAL. GOV'T CODE § 810-996.6. The Tort Claims Act was the California Legislature's response to the California Supreme Court's decision to abolish government immunity from tort liability in *Muskopf v. Corning Hospital District*, 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961).

6. CAL. GOV'T CODE § 815 (West 1980). Section 815 provides:

Except as otherwise provided by statute:

(a) A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person.

(b) The liability of a public entity established by this part (commencing with Section 814) is subject to any immunity of the public entity provided by statute, including this part, and is subject to any defenses that would be available to the public entity if it were a private person.

7. *Id.*

8. *Id.*

9. CAL. GOV'T CODE § 835 (West 1980). Section 835 provides:

Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either:

(a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or

(b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

ity,¹⁰ stating: "neither a public entity nor a public employee is liable for an injury caused by a natural condition of any unimproved public property, including but not limited to any natural condition of any lake, stream, bay, river, or beach."¹¹ The official legislative committee comment to section 831.2 indicates that the immunity was intended to permit recreational use of unimproved public property at the user's risk.¹² Without such immunity, government entities would be motivated simply to prohibit use of certain public lands to avoid tort liability rather than incur the expenses of both precautionary improvements and insurance.¹³ Recognizing the limited funding for improving recreational public property by local municipal governments, the legislature believed it was "not unreasonable to expect persons who voluntarily use unimproved public property in its natural condition to assume the risk of injuries arising therefrom as a part of the price to be paid for the benefits received."¹⁴ Because most of the beach environment's dangers are natural in origin, the legislature clearly intended to include them within the immunity of section 831.2, particularly in light of the specific inclusion of public beaches as property covered by this section.¹⁵

In *Gonzales v. City of San Diego*,¹⁶ the court essentially removed the immunity of section 831.2 whenever an injury occurs on a public beach where some form of protective service, such as lifeguard service, is provided. This interpretation of section 831.2 creates a serious dilemma for California coastal communities.

This Comment argues that the California Legislature and courts should maintain the viability of the section 831.2 immunity. It first examines the legislative background and policy of section 831.2. The Comment then critically examines *Gonzales* and the judicial erosion of the immunity. Finally, this Comment suggests that because the courts have drifted away from a faithful application of the legislative intent of the section, there is a legitimate need for a legislative amendment to section 831.2.

10. CAL. GOV'T CODE § 831.2 (West 1980).

11. *Id.*

12. CAL. GOV'T CODE § 831.2 legislative committee comment.

13. *Id.*

14. *Id.*

15. Section 831.2 expressly grants absolute immunity for any injury caused by "a natural condition" of "any . . . beach". CAL. GOV'T CODE § 831.2 (West 1980).

16. 130 Cal. App. 3d 882, 182 Cal. Rptr. 73 (1982).

Generally, the immunity provisions of the Act prevail over the sections imposing liability.¹⁷ By enacting Government Code section 831.2, the legislature clearly intended to protect public entities from liability for injuries arising from the use of unimproved public property in its natural condition.¹⁸ This immunity was intended to be broadly applied.¹⁹ The Act was enacted in 1963 after consideration of recommendations by the California Law Revision Commission (Commission).²⁰ Section 831.2, as originally proposed by the Commission, only provided a qualified immunity.²¹ As part of its recommendations, the Commission submitted a research study on government immunity to the legislature.²² A section of the study discussed the proposed qualified immunity of section 831.2 and the level of protection it would afford public entities.²³ Discussing beach-related liability, the study suggested that a public entity would not be liable for failing to provide lifeguard services, but might be held liable if lifeguards who were provided negligently performed their duties.²⁴

In the final draft of section 831.2, however, the senate specifically

17. CAL. GOV'T CODE § 815 legislative committee comment.

18. *See supra* notes 5-15.

19. *Id.*

20. The California Law Revision Commission is a body composed of gubernatorial appointees, one state senator, and one state assembly member. Generally, when a major revision of the law is proposed, the legislature authorizes the Law Revision Commission to study the proposed reforms. Although the Commission is independent of the legislature, the legislature controls the topics to be reviewed by the Commission. Additionally, while the legislature does not always adopt the recommendations of the Commission, California courts often depend on Law Revision Commission materials for evidence of legislative intent. *See, e.g.,* Comment, *The Use of Extrinsic Aids in Determining Legislative Intent in California: The Need for Standardized Criteria*, 12 PAC. L. J. 189, 200-01 (1980).

21. The Law Revision Commission recommendation provided:

(a) Neither a public entity nor a public employee is liable for an injury caused by a natural condition of any natural lake, stream, river or beach, if at the time of the injury the person who suffered the injury was not using the property for a purpose for which the public entity intended the property to be used.

(b) Nothing in this section exonerates a public entity or a public employee from liability for injury proximately caused by such a condition if:

(1) the condition is a dangerous condition that would not be reasonably apparent to, and would not be anticipated by, a person using the property with due care; and

(2) the public entity or the public employee had actual knowledge of the condition a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

Recommendation Relating to Sovereign Immunity: Number 1—Tort Liability of Public Entities and Public Employees, 4 CAL. L. REV'N COMM'N REP. 802, 852 (1963) [hereinafter cited as *Recommendation*].

22. *A Study Relating to Sovereign Immunity*, CAL. L. REV'N COMM'N (Jan. 1963).

23. *Id.* at 494-95.

24. *Id.*

rejected the two qualifications on immunity proposed by the Commission.²⁵ The two rejected qualifications would have: "(a) limited immunity to injuries caused by natural conditions of bodies of water and watercourses, sustained by persons using the property for purposes not intended by the entity, and (b) permitted liability if natural conditions on these properties amounted to a hidden trap known to the entity."²⁶ By rejecting the Commission's proposals for qualified immunity, the legislature chose instead what it termed "absolute immunity from liability."²⁷

In determining the scope of "natural condition" immunity, the legislature was concerned that the cost involved in putting recreational property in safe condition and the "expense of defending claims for injuries, would probably cause many public entities to close such areas to public use."²⁸ Public entities especially might be tempted to close beaches in light of the large surf and rough water that make California beaches popular throughout the world for surfing.²⁹ Few entities, public or private, would voluntarily assume the risk of responding to claims and paying damages for the injuries that inevitably result from such natural forces.³⁰ As early as 1963, the legislature was acutely aware that without immunity "the financial stability of many public entities may be unprotected because of the unavailability of insurance at rates they can afford to pay."³¹ Moreover, even if insured, public entities would be unable to put the Pacific Ocean in a safe condition for public use. These concerns moti-

25. A. VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY PRACTICE, Appendix, legislative committee comment, 638-39 n.1 (1980).

26. *Id.* The full text of note 1 pp. 638-39 reads:
Legislative history. As recommended by the Law Revision Commission, *See Recommendation, supra* note 21, at 852, this section (a) limited immunity to injuries caused by natural conditions of bodies of water and watercourses, sustained by persons using the property for purposes not intended by the entity, and (b) permitted liability if natural conditions on these properties amounted to a hidden trap known to the entity. The Senate (Senate J, Feb. 26, 1963, p. 518; Mar. 12, 1963, p. 751) expanded the immunity to cover natural conditions of "any unimproved public property," and later rejected the two qualifications on immunity proposed by the commission (Senate J, Mar. 19, 1963, p. 903), leaving the section in its present form.

Id.

27. CAL. GOV'T CODE § 831.2 legislative committee comment.

28. *Id.*

29. *See* P. DIXON, WHERE THE SURFERS ARE: A GUIDE TO THE WORLD'S GREAT SURFING SPOTS (1968).

30. *Milligan v. City of Laguna Beach*, 34 Cal. 3d 829, 670 P.2d 1121, 196 Cal. Rptr. 38 (1983).

31. *Recommendation, supra* note 21, at 809.

vated the legislature to enact section 831.2 in 1963.³²

JUDICIAL TREATMENT OF SECTION 831.2 PRIOR TO GONZALES

Initially, California courts were faithful to the obvious legislative intent of section 831.2.³³ In *Rendak v. State*,³⁴ the First District Court of Appeals found the State immune from liability pursuant to section 831.2. This case involved a death caused by the collapse of a cliff upon an unimproved portion of a state operated beach.³⁵ The State Parks and Recreation Department had made some improvements to the beach area in *Rendak*. These improvements included parking facilities, rest rooms, and campfire rings. Because none of these improvements were in the immediate vicinity of the accident (the improvements were all at least 650 feet away), the court held that the site of the accident was natural and unimproved as a matter of law.³⁶ However, dicta in the *Rendak* opinion suggests that the immunity may not apply in certain situations. A factual question often may exist as to whether a naturally existing, dangerous condition is functionally assimilated into the improved area.³⁷ Nevertheless, it is noteworthy that the *Rendak* court,

in holding that improvement of a park area does not remove the immunity from the unimproved area, indicated that the immunity granted by the section is to be given a broad application as it pointed out that the Legislature in adopting the section [831.2] did *not* adopt the narrow one originally recommended by the Law Revision Commission (4 Cal. Law Revision Commission (1963), p. 852).³⁸

In another beach-related injury case, the court in *Fuller v. State*,³⁹ applying section 831.2, upheld a jury verdict for the City of Santa Cruz and the State of California. In this 1975 case, a seventeen year old youth dove from a ten to fifteen foot rock ledge into approximately three feet of water and broke his neck.⁴⁰ Citing *Rendak*,⁴¹ the *Fuller* court held that the location on the beach of portable life-

32. CAL. GOV'T CODE § 831.2 legislative committee comment. See also *Milligan*, 34 Cal. 3d at 833, 670 P.2d at 1123-24, 196 Cal. Rptr. at 41 (section 831.2 seeks to eliminate "the expense of making the property safe, responding to tort actions, and paying damages").

33. See *Eben v. State*, 130 Cal. App. 3d 416, 181 Cal. Rptr. 714 (1982); *County of Sacramento v. Superior Court*, 89 Cal. App. 3d 215, 152 Cal. Rptr. 391 (1979); *Fuller v. State*, 51 Cal. App. 3d 926, 125 Cal. Rptr. 586 (1975); *Osgood v. County of Shasta*, 50 Cal. App. 3d 586, 123 Cal. Rptr. 442 (1975); *Rendak v. State*, 18 Cal. App. 3d 286, 95 Cal. Rptr. 665 (1971).

34. 18 Cal. App. 3d 286, 95 Cal. Rptr. 665 (1971).

35. *Id.* at 288, 95 Cal. Rptr. at 666.

36. *Id.*

37. *Id.* at 288, 95 Cal. Rptr. at 667.

38. *Fuller*, 51 Cal. App. 3d at 937, 125 Cal. Rptr. at 592 (emphasis added) (discussing *Rendak*).

39. 51 Cal. App. 3d 926, 125 Cal. Rptr. 586 (1975).

40. *Id.* at 935, 125 Cal. Rptr. at 591.

41. *Rendak v. State*, 18 Cal. App. 3d 286, 95 Cal. Rptr. 665 (1971).

guard towers, restroom facilities, and concrete fire rings did not turn otherwise *unimproved* public property into *improved* public property.⁴² More importantly, the court stated that improvement work in the vicinity of the beach area (for example, construction of a harbor, jetties, etc.) that changed the sand level and water depth at the point of the plaintiff's accident, "obviously was not the type of improvement to . . . the beach that would take the area out of the immunity provision of section 831.2."⁴³

Section 831.2 later was applied by the court in *Osgood v. County of Shasta*⁴⁴ to a death occurring on a man-made lake. The decedent was struck and killed by a motorboat while water-skiing on the county-operated lake. The plaintiffs alleged wrongful death caused by the dangerous, overcrowded condition resulting from the County's promotion of the lake as a recreational area.⁴⁵ The plaintiffs also asserted that section 831.2 did not apply because the lake, being man-made, was not in a natural condition. In affirming the demurrer, the court carefully reviewed the legislative history of section 831.2 and held that the immunity was unconditional. The court further noted that section 831.2 applied to "a natural condition of any lake, stream, river or beach" *not* "a natural condition of any *natural* lake, stream . . ." as the statute originally had read when first introduced in 1963.⁴⁶

Two months after the *Fuller* decision, however, the Fourth District Court of Appeal began to limit the application of section 831.2. In *Buchanan v. City of Newport Beach*,⁴⁷ the court, failing to make reference to *Fuller*, held that an injured bodysurfer stated a cause of action because the governmental entity knew that improvements to an adjacent harbor entrance had altered "the flow of the ocean, the wave action and the slope of the beach."⁴⁸ The plaintiff in *Buchanan* argued that the harbor entrance construction and the resulting accretion of sand on an adjacent beach changed formerly "spilling" waves to dangerous "plunging" type waves.⁴⁹ The court held that

42. *Fuller*, 51 Cal. App. 3d at 937, 125 Cal. Rptr. at 592.

43. *Id.*

44. 50 Cal. App. 3d 586, 123 Cal. Rptr. 442 (1975).

45. *Id.* at 588, 123 Cal. Rptr. at 443.

46. *Id.* at 589-90, 123 Cal. Rptr. at 444.

47. 50 Cal. App. 3d 221, 123 Cal. Rptr. 338 (1975).

48. *Id.* at 227, 123 Cal. Rptr. at 341.

49. *Id.* at 226, 123 Cal. Rptr. at 340. For a general discussion of wave classifications, see LIFESAVING AND MARINE SAFETY, *supra* note 4, at 29-30 (1981), which explains that:

waves are classified into three primary forms—(1) *spilling waves*, which are

altering the ocean flow, the wave type and the slope of the beach created unnatural conditions. The court further stated that whether such unnatural conditions become natural again with the passage of time is a question of fact.⁵⁰

Accordingly, the court held that the defendant's motion for non-suit had been granted improperly. The court believed that sufficient evidence existed to suggest that the injury was not caused by a natural condition of unimproved public property. The court also noted that once a city falls outside the absolute immunity of section 831.2, questions of fact still remain as to whether the condition actually was dangerous and whether the failure to warn of the danger was a proximate cause of the injury.⁵¹

Gonzales v. City of San Diego: THE CHUBASCO STRIKES

While *Buchanan* slightly narrowed Government Code section 831.2, the viability of immunity for beach-related injuries was virtually dismantled in 1982 by the Fourth District Court of Appeal in *Gonzales v. City of San Diego*.⁵² On June 18, 1978, Theresa Gonzales entered the ocean surf at Black's Beach in San Diego. No lifeguards were on duty in the area. Gonzales drowned after she was caught in a rip current.⁵³ Her children later sued the City of San Diego, claiming that it had failed to warn swimmers of the dangerous rip currents.⁵⁴ The City demurred on the basis of section 831.2.

Unlike *Buchanan*,⁵⁵ no harbors or jetties were located near the accident, and the City had made no changes affecting the surf conditions. In fact, the City's only action that had any impact on safety was providing police or lifeguard patrols.⁵⁶ Contrary to the legislative intent⁵⁷ of section 831.2, the appellate court held that by volun-

formed by swells as they move over an ocean floor that ascends gradually beneath them, with the crest of the wave, when shallow water is reached, spilling onto the wave face until the wave itself is engulfed by foam; (2) *plunging waves*, which are formed when a swell suddenly strikes a shallow ocean bottom, reef, or other obstacle and breaks with flying spray, both expending most of its energy and transforming it into a spilling wave for its remaining distance to shore; and (3) *surging waves*, which occur where water is deep adjacent to shoreline cliffs, reefs, or steep beaches, with the wave[s] keeping their trochoidal . . . form until they crash against the shoreline barrier.

50. *Buchanan*, 50 Cal. App. 3d at 227, 123 Cal. Rptr. at 341.

51. *Id.* at 228, 123 Cal. Rptr. at 342.

52. 130 Cal. App. 3d 882, 182 Cal. Rptr. 73 (1982).

53. Although the court said that Gonzales drowned in a "dangerous riptide condition," there is technically no such condition. Gonzales was actually caught in a "rip current." See generally LIFESAVING AND MARINE SAFETY, *supra* note 4, at 34-37 (explaining how rip currents are formed).

54. *Gonzales*, 130 Cal. App. 3d at 885, 182 Cal. Rptr. at 75.

55. 50 Cal. App. 3d 221, 123 Cal. Rptr. 338 (1975).

56. *Gonzales*, 130 Cal. App. 3d at 884, 182 Cal. Rptr. at 74.

57. The legislature considered and rejected an exception to the natural condition immunity for injuries caused by dangerous natural conditions unknown to injured parties

tarily providing lifeguard services at a public beach, the immunity afforded public entities under section 831.2 is negated.

The *Gonzales* court substantially deviated from existing case law to reach its holding. In no other section 831.2 case had a court looked to the conduct of the public entity to determine whether the immunity applied.⁵⁸ *Gonzales* is particularly inconsistent with *Fuller*.⁵⁹ In *Fuller*, the beach area at the accident site was heavily patronized, and city lifeguards had instructions to warn users about the hazards of diving from the point.⁶⁰ Additionally, the City or the State had placed warning signs around the point in previous years, but the signs had disappeared by the time of Fuller's injury.⁶¹ In spite of these voluntary attempts to warn of the danger, the court approved of the jury's application of section 831.2 immunity.

Notwithstanding earlier section 831.2 cases,⁶² the *Gonzales* court reasoned that the combination of the natural rip current and the City's occasional lifeguard patrols created a "hybrid dangerous condition"⁶³ which circumvented the absolute immunity of section 831.2. The court held that a cause of action was stated because the City negligently performed the voluntarily-provided lifeguard service by failing to warn Gonzales of the hazardous rip current.⁶⁴ The appellate court thereby reversed the demurrer granted by the trial court.⁶⁵ As a result of *Gonzales*, California coastal communities are in the awkward position of substantial liability exposure for voluntarily providing lifeguard services.⁶⁶ This exposure discourages life-

but known to a public entity and which they failed to protect against. The legislature also considered and rejected the voluntarily assumed duty exception to the natural condition immunity and specifically deleted a provision which would have made the immunity unavailable when a public entity assumed a duty to make property safe by voluntarily opening it to public use. *Recommendation, supra* note 21, at 807, 852.

58. See *Eben v. State*, 130 Cal. App. 3d 416, 181 Cal. Rptr. 714 (1982); *County of Sacramento v. Superior Court*, 89 Cal. App. 3d 215, 152 Cal. Rptr. 391 (1979); *Fuller v. State*, 51 Cal. App. 3d 926, 125 Cal. Rptr. 586 (1975); *Osgood v. County of Shasta*, 50 Cal. App. 3d 586, 123 Cal. Rptr. 442 (1975); *Rendak v. State*, 18 Cal. App. 3d 286, 95 Cal. Rptr. 665 (1971).

59. *Fuller*, 51 Cal. App. 3d 926, 125 Cal. Rptr. 586.

60. *Id.* at 936, 125 Cal. Rptr. at 591.

61. *Id.*

62. See *Fuller v. State*, 51 Cal. App. 3d 926, 125 Cal. Rptr. 586 (1975); *Osgood v. County of Shasta*, 50 Cal. App. 3d 586, 123 Cal. Rptr. 442 (1975); *Rendak v. State*, 18 Cal. App. 3d 286, 95 Cal. Rptr. 665 (1971); see also *Eben v. State*, 130 Cal. App. 3d 416, 181 Cal. Rptr. 714 (1982); *County of Sacramento v. Superior Court*, 89 Cal. App. 3d 215, 152 Cal. Rptr. 391 (1979).

63. *Gonzales*, 130 Cal. App. 3d at 885, 182 Cal. Rptr. at 75.

64. *Id.*

65. *Id.* at 882, 182 Cal. Rptr. at 73.

66. *Id.* at 886, 182 Cal. Rptr. at 75.

guard protection and, therefore, is contrary to sound public policy.

Ironically, only two months before the *Gonzales* decision, the court issued *Keyes v. Santa Clara Valley Water District*.⁶⁷ *Keyes* was injured when he struck a submerged object while diving in a man-made reservoir. The *Keyes* court recognized—perhaps in the wake of *Buchanan*—that the Act does not set forth a precise standard for determining just how much developmental activity is required before public property in its natural state becomes improved property.⁶⁸ Nevertheless, the court observed that case precedent established that rejection of the natural condition immunity requires at least “some form of physical change in the condition of the property at the location of the injury, which justifies the conclusion that the public entity is responsible for reasonable risk management in that area.”⁶⁹ However, in *Gonzales*, the injury resulted from a naturally-caused rip current, and there was no such “physical change in the . . . property,”⁷⁰ yet the court rejected natural condition immunity.

Gonzales noticeably ignored an important Fifth District Court of Appeal case decided only six weeks before. That case, *Eben v. State*,⁷¹ like *Osgood v. County of Shasta*,⁷² involved a water-skiing accident on a man-made lake. The *Eben* court applied section 831.2 immunity to the State where it had undertaken the duty to warn of dangers on certain areas of the lake, but not at the injury site. The court held that a voluntary undertaking to provide danger warnings in no way impedes the absolute immunity of section 831.2.⁷³

Gonzales also disregarded the 1979 Third District Court of Appeal case, *County of Sacramento v. Superior Court*.⁷⁴ The *Sacramento* court implied that section 831.2 applies even when a public entity provides safety services.⁷⁵ In *Sacramento*, a drowning was caused by a snag of debris in the American River. A park ranger had noticed the dangerous condition and reported it to his supervisor only two days before the deceased was knocked from his raft by the “snag.” The court stated that both the snag in the river and the flow of the water which caused the death were natural. These conditions did not involve anything man-made or artificial and, therefore, were within the meaning of section 831.2.⁷⁶ The court described the

67. 128 Cal. App. 3d 882, 180 Cal. Rptr. 586 (1982).

68. *Id.* at 887, 180 Cal. Rptr. at 589 (citing A. VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY PRACTICE § 3.42, at 256 (1980)).

69. *Id.* at 888, 180 Cal. Rptr. at 589 (quoting A. VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY PRACTICE § 3.42, at 256 (1980)).

70. *Id.*

71. 130 Cal. App. 3d 416, 181 Cal. Rptr. 714 (1982).

72. 50 Cal. App. 3d 586, 123 Cal. Rptr. 442 (1975).

73. *Id.*

74. 89 Cal. App. 3d 215, 152 Cal. Rptr. 391 (1979).

75. *Id.* at 217-19, 152 Cal. Rptr. at 392-93.

76. *Id.* at 218, 152 Cal. Rptr. at 392.

American River in a manner which should have been applied to the Pacific Ocean in *Gonzales*:

For ages its waters flowed on the very same bed upon which the snag established itself, heavy in time of cloudburst, light in times of drought, essentially the same way they flow today. This flow, and conditions incidental to it, are no less natural since the advent of human regulation than before; and to say otherwise would be to impose a synthetic meaning upon the uncomplicated and straightforward language of section 831.2.⁷⁷

Gonzales appears to have been decided incorrectly for several reasons. First, *Gonzales* extended the plain meaning of the absolute natural condition immunity of section 831.2.⁷⁸ It is important to remember not only what the legislature said in section 831.2, but also what the legislature refused to say.⁷⁹ the legislative history indicates that the legislature specifically considered and rejected the exceptions to the natural condition immunity presented in a *Gonzales* setting.⁸⁰ In denying immunity, the *Gonzales* court has ignored the statute as adopted; *Gonzales* seems to deal with the earlier version suggested to and rejected by the legislature.⁸¹ The holding returns to 831.2 the very same qualifications that the legislature deliberately removed.⁸² This type of policymaking adjudication violates the fundamental rule of statutory interpretation which states: "if statutory language is clear and unambiguous there is no need for construction, and the courts should not indulge in it."⁸³

Second, the hybrid condition used to circumvent 831.2 immunity in *Gonzales* resulted from the "combination of a natural defect within the property and the third party conduct of" the public entity.⁸⁴ An analysis based on "third party conduct" is inappropriate under the *Gonzales* circumstances. It is difficult to determine who the "third party" really is in the decision. The City of San Diego was the defendant; it should not have been labeled a third party. Third party conduct refers to conduct of a party *other than* the defendant against which the defendant owes a duty to protect.⁸⁵ This

77. *Id.* at 220, 152 Cal. Rptr. at 393.

78. *See Gonzales*, 130 Cal. App. 3d at 885-89, 182 Cal. Rptr. at 75-77.

79. *See supra* notes 21-27 and accompanying text.

80. *Id.*

81. *Compare Rendak v. State*, 18 Cal. App. 3d 286, 287, 95 Cal. Rptr. 665, 667 (1971).

82. *Id.*

83. *Solberg v. Superior Court*, 19 Cal. 3d 182, 198, 561 P.2d 1148, 1158, 137 Cal. Rptr. 460, 470 (1977); *Milligan v. City of Laguna Beach*, 34 Cal.3d 829, 670 P.2d 1121, 196 Cal. Rptr. 38 (1983).

84. *Gonzales*, 130 Cal. App. 3d at 885, 182 Cal. Rptr. at 75.

85. *See, e.g.,* RESTATEMENT (SECOND) OF TORTS § 315 (1965); *Davidson v. City*

principle holds true in factual settings involving a dangerous condition of public property.⁸⁶ In this case, there was no "third party" conduct to cause Gonzales' death; the accident resulted from a naturally-occurring rip current. If what the court actually meant was to categorize the Pacific Ocean as a dangerous "third party," all natural conditions would be subsumed under a *Gonzales* analysis.⁸⁷

Third, the *Gonzales* rationale suffers from an even more fundamental weakness. The court imposes "dangerous condition" liability, under section 835,⁸⁸ for the City's failure to warn the beach user of the "hybrid dangerous condition."⁸⁹ A component of the "hybrid dangerous condition," however, was the City's failure to warn of the natural rip current.⁹⁰ In other words, the City's "failure to warn" is treated not only as the basis for "dangerous condition" liability, but also as an integral part of the dangerous condition itself. The circularity of using the City's "failure to warn" in two distinct capacities to establish liability completely emasculates natural condition immunity.⁹¹

Under *Gonzales*, once a public entity provides any measure of protection against natural hazards of its unimproved property, it is exposed to liability for *any* negligent failure to protect.⁹² Natural condition immunity becomes unavailable for beach-related injuries where the public entity provides any type of protection service, even seasonal or part-time.⁹³ Ironically, if the City of San Diego had not provided any safety services at Black's Beach, it would have been absolutely immune from liability for its failure to protect.⁹⁴ As pointed out by the City of San Diego in its supplemental brief in *Gonzales*:

[I]f section 831.2 were not available to public entities which furnished lifeguard services, public entities would be compelled to take either two courses of action, both of which are contrary to the purpose and intent of section 831.2, and sound public policy. Public beaches would be compelled to either close beaches entirely, or to withdraw all lifeguard services from public beaches, to avoid the enormous burden and expense of putting public

of Westminster, 32 Cal. 3d 197, 203, 649 P.2d 894, 897, 185 Cal. Rptr. 252, 255 (1982); *Thompson v. County of Alameda*, 27 Cal. 3d 741, 751, 614 P.2d 728, 734, 167 Cal. Rptr. 70, 76 (1980); *Tarasoff v. Regents of Univ. of Cal.*, 17 Cal. 3d 425, 435, 551 P.2d 334, 342-43, 131 Cal. Rptr. 14, 23 (1976).

86. See, e.g., *Peterson v. San Francisco Community College Dist.*, 36 Cal. 3d 799, 685 P.2d 1193, 205 Cal. Rptr. 842 (1984); *Hayes v. State*, 11 Cal. 3d 469, 472, 521 P.2d 855, 857, 113 Cal. Rptr. 599, 601 (1974).

87. *Gonzales*, 130 Cal. App. 3d at 885-86, 196 Cal. Rptr. at 75.

88. CAL. GOV'T CODE § 835 (West 1980).

89. *Gonzales*, 130 Cal. App. 3d at 886, 888-89, 196 Cal. Rptr. at 76-77.

90. *Id.* at 885, 196 Cal. Rptr. at 75.

91. *Id.*

92. But see *id.* at 886-87, 196 Cal. Rptr. at 76.

93. See *Gonzales*, 130 Cal. App. 3d at 889, 196 Cal. Rptr. at 77. But see *Fuller*, Cal. App. 3d at 937, 125 Cal. Rptr. at 592.

94. See *Gonzales*, 130 Cal. App. 3d at 885-89, 182 Cal. Rptr. at 75-77.

beaches in a safe condition, and to avoid the inevitable expense (which would be astronomical) of defending against claims for injuries, and of paying judgments.⁹⁵

The *Gonzales* court declined to accept the argument that lack of section 831.2 immunity would result in beach closures. The court stated that liability would not "compel public entities to close such beaches, because of the scarcity of such natural, recreational real property and the inevitable public outcry in response to any such attempt."⁹⁶ The legislature, however, was specifically concerned about just such closures when it enacted section 831.2.⁹⁷ Moreover, the court neglected to discuss the other undesirable alternative available to public entities seeking to retain the immunity for beach accidents — complete withdrawal of lifeguard services from the beach.⁹⁸

The suspect reasoning in *Gonzales* recently manifested itself in *Taylor v. City of Newport Beach*.⁹⁹ In *Taylor*, the plaintiff was injured when he struck his head on a sandbar after a running dive from the beach.¹⁰⁰ The injury resulted in quadraplegia. The plaintiff argued the existence of a "hybrid condition" to circumvent section 831.2 immunity.¹⁰¹ The plaintiff presented his case under section 835, arguing that the city had a duty to warn him of the likely presence of shifting submerged sandbars.¹⁰² As in *Gonzales*, the City had done nothing to alter the natural condition of the property other than to provide lifeguard services.¹⁰³ Despite section 831.2, the trial court, following *Gonzales*, disagreed with the City's assertion of immunity.¹⁰⁴ The trial court felt it was bound to follow *Gonzales* and that the dangerous condition alleged by Taylor lost its natural "characterization" due to the combination of the natural defect (the sandbar) and Newport Beach's conduct in providing lifeguards who

95. Supplemental Brief for Respondent at 7, *Gonzales v. City of San Diego*, 130 Cal. App. 3d 882, 182 Cal. Rptr. 73 (1983).

96. *Gonzales*, 130 Cal. App. 3d at 887, 182 Cal. Rptr. at 76.

97. What information the *Gonzales* court based its speculation is unknown. That the closure of beaches would be precluded by "the inevitable public outcry in response to any such attempt" is seemingly an area of legislative, not judicial concern. See, e.g., CAL. GOV'T CODE § 831.2 legislative committee comment.

98. Under the *Gonzales* holding, this option apparently would protect public entities from liability. See *Gonzales*, 130 Cal. App. 3d at 884-85, 182 Cal. Rptr. at 74-75.

99. No. 35 46 23, (Orange County Super. Ct.) (Oct. 12, 1984).

100. Trial Brief for Defendant at 1, *Taylor*.

101. Trial Brief for Plaintiff at 4, *Taylor*.

102. *Id.* at 5.

103. Trial Brief for Plaintiff at 3, *Taylor*.

104. Brief for Appellant and Cross-Respondent at 7, *Taylor*, appeal docketed, No. G 0002345 (4th Dist. Ct. App.).

failed to warn Taylor about the sandbar.¹⁰⁵

Based on the Taylor court's pretrial decision to follow *Gonzales*, the City stipulated that the section 831.2 issue would not go to the jury. The City, however, did preserve the right to challenge the applicability of *Gonzales* on appeal. To determine whether the *Gonzales* issue would be relevant on appeal, the parties agreed that after the verdict on liability was entered, the jury would be asked to determine the factual question of whether Taylor's injury was caused by a natural condition.¹⁰⁶ Although the jury returned a six million dollar verdict for Taylor on the liability issue, they specifically found that Taylor's injury had been caused by a natural condition of unimproved public property.¹⁰⁷ Based on this factual determination, but for *Gonzales*, section 831.2 would have provided immunity to the City as a matter of law.¹⁰⁸

Gonzales and *Taylor* present a Draconian dilemma for California's coastal communities. Communities may continue to provide lifeguard services and risk "the expense of making the property safe, responding to tort actions, and paying damages."¹⁰⁹ Alternatively, these communities may choose to avoid this expense by closing their beaches, or removing from them existing protection against nature's forces.¹¹⁰ Closure of public beaches would be contrary to the purpose of section 831.2.¹¹¹ A lifeguard "retreat," leaving the recreational public to protect itself from the chubasco-created surf and other natural beach dangers, would violate sound public policy.¹¹²

THE NEED FOR LEGISLATIVE INTERVENTION

The need for legislative intervention is clear. The California Supreme Court declined to grant a hearing in *Gonzales*; thus, it has not

105. *Id.*

106. *Id.*

107. *Id.* at 8.

108. *Id.*

109. *Milligan*, 34 Cal. 3d at 833, 670 P.2d at 1124, 196 Cal. Rptr. at 41.

110. *Grissett-Welsh, Coastal Cities Awash in Ocean Mishap Suits*, L.A. Daily J., Dec. 31, 1984, § 2, at 1, col. 1.

111. CAL. GOV'T CODE § 831.2 legislative committee comment.

112. If a purpose of imposing liability is to deter dangerous conduct, the consequences of the *Gonzales* holding are contrary to essential tort principle. In the face of numerous beach injury claims following the *Taylor* verdict, the City of Laguna Beach openly began considering withdrawing lifeguard service from its beaches. *Grissett-Welsh*, *supra* note 110, § 2, at 1, col. 1; *Swegles, Beach Injury Suit Prompts Coastal Cities to Appeal*, San Clemente Daily Sun Post, Oct. 11, 1985, at 1, col. 5. It is noteworthy that Laguna Beach lifeguards rescue approximately two thousand people from the surf each year. Statistics on file with Huntington Beach Lifeguard Captain Bill Richardson. Captain Richardson is the statistician for the Western United States Lifesaving Association. Most of those rescued are pulled from rip currents similar to that which caused the death in *Gonzales*.

yet confronted this issue.¹¹³ The Fourth District Court of Appeal recently granted review in *Taylor*.¹¹⁴ If the Supreme Court eventually hears *Taylor*, it may use the opportunity to overrule the *Gonzales* rationale; this is unlikely, however, because they refused to review *Gonzales*. The inconsistency between *Gonzales* and earlier decisions,¹¹⁵ and the uncertainty of future judicial action, places the legislature in the best position to reestablish the legislative purpose underlying section 831.2 immunity.

In addition to the possibility of beach closures or a reduction in safety services, the lack of affordable liability insurance for public entities adds a certain urgency to the desirability of legislative intervention.¹¹⁶ Affordable liability insurance for public entities is no less a consideration today as when the Act first was enacted. The high cost of insurance jeopardizes not only public entities' ability to compensate deserving claimants, but also their ability to provide essential services.¹¹⁷

This undesirable situation should be confronted squarely by the legislature. The scope of the government's liability was intended to remain exclusively with the legislature.¹¹⁸ The *Gonzales* exception to section 831.2 immunity is the exact type of judicially-created uncertainty which the Act was designed to prevent.¹¹⁹ The limits of public entity liability should not be determined on a case-by-case basis. The resulting uncertainty is detrimental to both public entities and to persons injured by public entities.¹²⁰ Adding further to the uncertainty of the situation is California Civil Code section 846.¹²¹ Cur-

113. *Gonzales*, 130 Cal. App. 3d 882, 182 Cal. Rptr. 73 (1982).

114. Swegles, *supra* note 112, at 1, col. 5.

115. See *Eben v. State*, 130 Cal. App. 3d 416, 181 Cal. Rptr. 714 (1982); *Keyes v. Superior Court*, 128 Cal. App. 3d 882, 180 Cal. Rptr. 586 (1975); *County of Sacramento v. Superior Court*, 89 Cal. App. 3d 215, 152 Cal. Rptr. 391 (1979); *Fuller v. State*, 51 Cal. App. 3d 926, 125 Cal. Rptr. 586; *Osgood v. County of Shasta* (1975), 50 Cal. App. 3d 926, 123 Cal. Rptr. 442; *Rendak v. State*, 18 Cal. App. 3d 286, 95 Cal. Rptr. 665 (1971).

116. See generally Cox, *Cities, Counties Brace for Lawsuits Without Insurance*, L.A. Daily J., Aug. 27, 1985, § 2, at 1; Shapiro, *The Naked Cities*, Newsweek, Aug. 26, 1985 at 22.

117. *Id.*

118. CAL. GOV'T CODE § 815 (West 1980).

119. *Id.*

120. *Recommendation*, *supra* note 21, at 808-09, 811.

121. CAL. CIV. CODE § 846 (West 1980). Section 846 provides:

An owner of any estate or other interest in real property, whether possessory or non-possessory, owes no duty of care to keep the premises safe for entry or use by others for any recreational purpose or to give any warning of hazardous conditions, uses of, structures, or activities on such premises to persons entering

rently section 846 provides general landowner immunity to suits by recreational users of land. In the 1983 case, *Delta Farms Reclamation District v. Superior Court*,¹²² the state supreme court held that the landowner immunity of section 846 does not apply to California governmental entities. The immunity does, however, apply to recreational land owned by the federal government.¹²³

If the legislature effectively deals with the issue, public entities may better plan and budget for their potential liabilities. The ability to forecast liability risk may assist public entities in obtaining proper and adequate insurance coverage. Further, a clearly defined scope of liability will discourage individuals from filing unmeritorious claims, and public entities will be discouraged from resisting those claims with obvious merit.¹²⁴

Some legislation has been proposed, albeit unsuccessfully. In response to the dilemma of California beach communities, an amendment to section 831.2 was introduced in the senate on February 14, 1985.¹²⁵ The proposed amendment provided that public property remains natural and unimproved despite the performance of public services on the property (for example, lifeguard services), "or the presence of improvements, so long as the primary cause of the condition

for such purpose, except as provided in this section.

A "recreational purpose," as used in this section, includes such activities as fishing, hunting, camping, *water sports*, hiking, spelunking, sport parachuting, riding, including animal riding, snowmobiling, and all other types of vehicular riding, rock collecting, sightseeing, picnicking, nature study, nature contacting, recreational gardening, gleanings, winter sports, and viewing or enjoying historical, archaeological, scenic, natural, or scientific sites.

An owner of any estate or any other interest in real property, whether possessory or non-possessory, who gives permission to another for entry or use for the above purpose upon the premise does not thereby (a) extend any assurance that the premises are safe for such purpose, or (b) constitute the person to whom permission has been granted the legal status of an invitee or licensee to whom a duty of care is owed, or (c) assume responsibility for or incur liability for any injury to person or property caused by any act of such person to whom permission has been granted except as provided in this section.

This section does not limit the liability which otherwise exists (a) for willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity; or (b) for injury suffered in any case where permission to enter for the above purpose was granted for a consideration other than the consideration, if any, paid to said landowner by the state, or where consideration has been received others for the same purpose; or (c) to any persons who are expressly invited rather than merely permitted to come upon the premises by the landowner.

Nothing in this section creates a duty of care or ground of liability for injury to person or property.

(emphasis added).

122. 33 Cal. 3d 699, 660 P.2d 1168, 190 Cal. Rptr. 494 (1983).

123. *Von Tegen v. United States*, 557 F. Supp. 256 (N.D. Cal. 1983) (applying section 846 to suits against the United States as a landowner).

124. *Id.*

125. S. Bill 433, 85-86 Sess., Feb. 14, 1985 (Bergeson).

that caused the injury or damage was a natural force."¹²⁶ The amendment, however, encountered heavy opposition. Opponents were concerned that the amendment would have broadened the section 831.2 immunity without clarifying the original legislative intent.¹²⁷ Immunity would be available even from injury claims involving public entity negligence or property improvement so long as such public entity was comparatively less responsible than the natural force in causing the injury.¹²⁸

Although Senate Bill 433 was defeated, attempts to reintroduce similar amendments continue.¹²⁹ The goal of any amendment to section 831.2 should be carefully limited to affirming the original intent of the section and overruling the *Gonzales* decision. The legislature should state clearly that the voluntary provision of public services on recreational property is not an improvement that circumvents natural condition immunity.¹³⁰

CONCLUSION

Substantial policy reasons justify governmental immunity for injuries caused by natural conditions of unimproved public property. Without immunity, public entities are exposed to liability for the

126. S. Bill 433 would have provided:

Section 1. Section 831.2 of the Government Code is amended to read:

831.2. Neither a public entity nor a public employee is liable for an injury caused by a natural condition of any unimproved public property, including but not limited to any natural condition of any lake, stream, bay, river or beach. Public property shall be considered to exist in a natural condition and in an unimproved state notwithstanding either of the following:

(a) The past or current performance, by or on behalf of a public party, of public services, related to the property or the use of the property.

(b) The presence of improvements, so long as the primary cause of the condition that caused the injury or damage was a natural force or a combination of forces.

Id.

127. Letter from Robert B. Steinberg, President of the California Trial Lawyers Association, to State Senator Marian Bergeson (Apr. 10, 1985); Telephone interview with Ms. Julie Frolberg, Chief of Staff for State Senator Marian Bergeson (Oct. 21, 1985).

128. Letter from Robert B. Steinberg, President of the California Trial Lawyers Association, to State Senator Marian Bergeson (Apr. 10, 1985).

129. Telephone interview with Ms. Julie Frolberg, Chief of Staff for State Senator Marian Bergeson (Jan. 20, 1986). Following the defeat of Senate Bill 433, Senator Bergeson introduced Senate Bill 1694, which specifically addressed the *Gonzales* factual setting. The bill would have preserved section 831.2 immunity notwithstanding the provision of protective services by beach communities. S. Bill 1694, 86-87 Sess., Feb. 5, 1986 (Bergeson). This proposal was also defeated.

130. *But see Gonzales v. City of San Diego*, 130 Cal. App. 3d 882, 182 Cal. Rptr. 73 (1982).

multitude of natural dangers that arise in the beach environment, including wave action, rip currents, submerged rocks, shifting sandbars, and dangerous marine life.¹³¹ Without immunity, public entities might prohibit the use of many of California's vast recreational resources, or abandon attempts to protect the public against injury in this environment.¹³²

The legislature specifically intended to insulate the government from liability by enacting section 831.2. The judiciary may eventually resolve the present dilemma of the beach cities by overruling *Gonzales*. Nonetheless, the appropriate solution to the judicial modification of section 831.2 lies in a legislative amendment to the section. This preference is founded on the potential speed, clarity, and certainty of an appropriate legislative response.

Determinations regarding the scope of government liability have been specifically and exclusively reserved for the legislature.¹³³ Such a measure would provide reasonable protection for California's coastal communities and, at the same time, would encourage the voluntary provision of lifeguard services on public beaches.

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131. See generally LIFESAVING AND MARINE SAFETY, *supra* note 4, at 9-12 (1981).

132. See CAL. GOV'T CODE § 831.2 legislative committee comment.

133. CAL. GOV'T CODE § 815 (West 1980).